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Cover Page Footnote

Illustration by Michael Gelen

RESTITUTION FOR THE NONSMOKER:

Holding the Tobacco Industry Liable for Injuries to Nonsmokers

by Kathleen B. Benesh

Introduction

One-third of American adults currently smoke tobacco products.¹ This totals more than 50 million Americans. These statistics support the view that indoor air pollution from tobacco smoke is pandemic.² On December 16, 1986, Surgeon General C. Everett Koop confirmed long time suspicions that the inhalation of tobacco smoke by nonsmokers is a health risk that requires appropriate remedial action.³

Tobacco pollution arises from sidestream and mainstream smoke.⁴ Sidestream smoke pollutes the air from the burning end of the cigarette, pipe, or cigar. It is unfiltered smoke. Mainstream smoke is initially inhaled by the smoker and then exhaled. A smoker generally inhales "8-9 times per cigarette ... for a total of 24 seconds, but the cigarette burns for 12 minutes and pollutes the air continuously . . .".⁵ Passive, or involuntary, smoking refers to the inhalation by nonsmokers of tobacco smoke from tobacco products.⁶

Recent legal literature has focused on the rights of smokers versus nonsmokers in a variety of settings including public places and the workplace. The outcome of this movement has been significant. Thirty-nine states and many localities have enacted legislation banning smoking on public transportation and in public places such as schools, hospitals, auditoriums, theatres, and government buildings.⁷ Similarly, the court opinions in *Shrimp v. New Jersey Bell Telephone*⁸ and *Smith v. Western Electric Co.*⁹ have supported nonsmokers' rights by recognizing the common law duty of the employer to provide a safe workplace. Efforts such as these by the legislature and judiciary are commendable, long overdue, and expected to continue.

Scholarly contributions from law, science and medicine suggest the notion of a right to protection from air pollution.¹⁰ Without intending to minimize the accomplishments of nonsmokers in the workplace, their efforts have nonetheless masked the tobacco industry's liability to nonsmokers for tobacco-related injuries and deaths.

This article focuses on the application of strict liability theory to the tobacco industry for injuries suffered by nonsmoking victims of tobacco pollution. Wrongful conduct by the tobacco industry which injures nonsmokers while simultaneously enriching the wrongdoer is analyzed as a restitutional wrong.¹¹ For example, has the tobacco industry been selling unsafe tobacco products (cigarettes) without paying for injuries (lung cancer) which the products caused? Specifically, should the tobacco industry be held strictly liable for tobacco pollution-caused injuries experienced by nonsmokers?

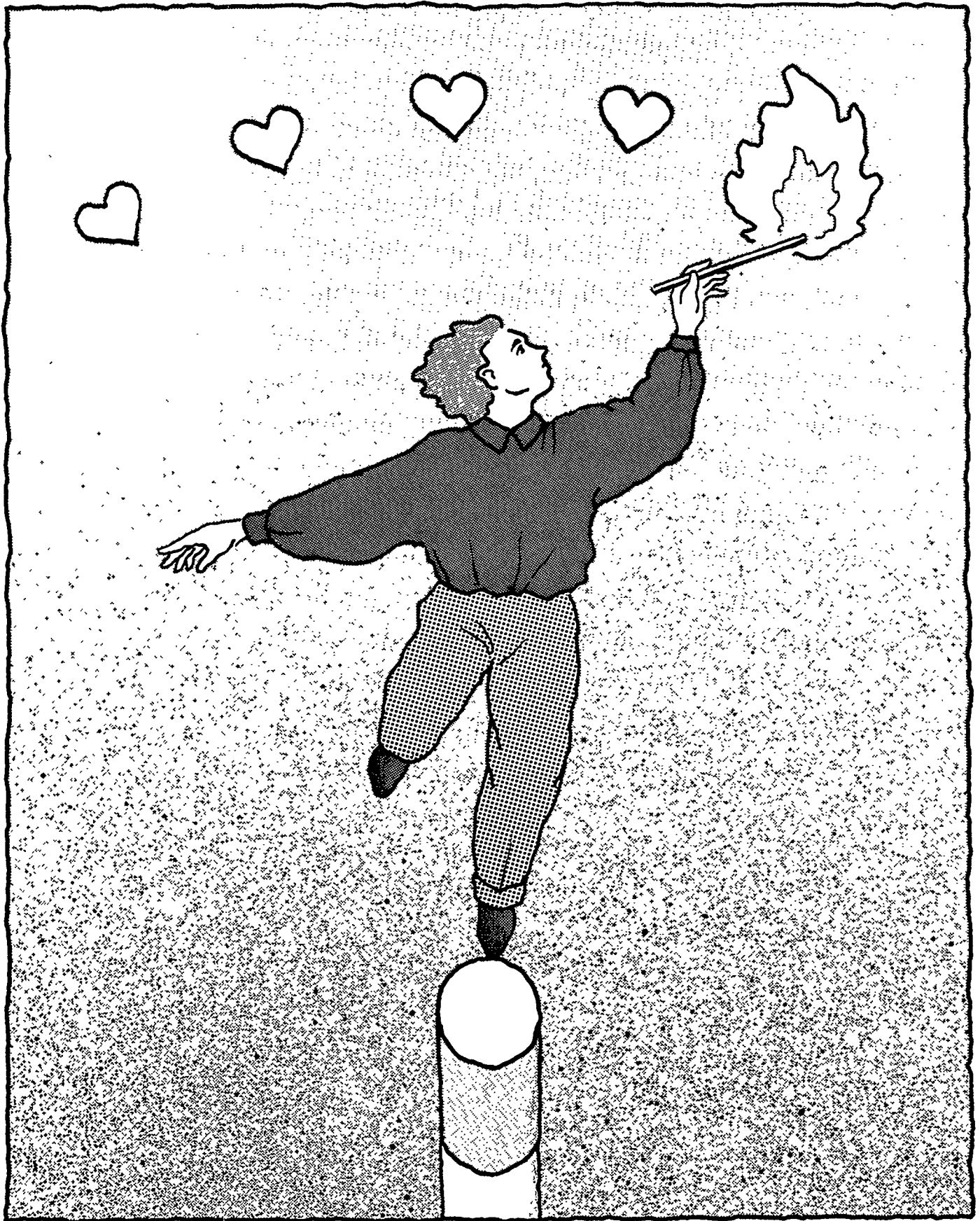
The Health Hazards of Tobacco Smoke

As early as 1650, smoking was linked with lung damage.¹² Later, in 1938, smoking was found to decrease longevity.¹³ However, it was the 1964 United States Surgeon General's Report on Smoking and Health¹⁴ that sparked the modern antismoking movement. The Surgeon General reported that hundreds of scientific studies concluded that "smoking was a health hazard of sufficient importance in the United States to warrant appropriate remedial action."¹⁵ The initial suggestion that tobacco smoke may cause physiological harm to nonsmokers was announced by the Surgeon General in his 1972 Report to Congress.¹⁶

Tobacco smoke was identified as the major cause of indoor air pollution by the Surgeon General in 1975.¹⁷ The suspicion of harm to nonsmokers was confirmed and expanded by the Surgeon General's 1979 report.¹⁸ For example, a common conclusion of numerous studies was that sidestream smoke is significantly more toxic than mainstream smoke.¹⁹ More than thirty pollutants are released into the air from tobacco smoke.²⁰ Scientists have concluded that sidestream smoke contains twice as much benzopyrene, nicotine²¹ and tar²² and five to seven times the amount of ammonia as mainstream smoke.

The health hazards associated with tobacco pollution are many and increasing. Cancer is widely perceived as the primary health risk associated with tobacco smoke. Surgeon General Koop reported this year that "involuntary smoking is a cause of disease, including lung cancer, in healthy nonsmokers."²³ Dr. Koop reiterated the National

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Academy of Sciences' estimate that 2,400 annual lung cancer deaths occur among nonsmokers from environmental tobacco smoke (ETS).²⁴

Carbon monoxide is a pollutant of tobacco smoke. It has been demonstrated that a cigarette smoker is exposed to 500 to 1500 parts per million of carbon monoxide during mainstream smoking.²⁵ Another study indicates that the amount of carbon monoxide in sidestream smoke is two to three times the amount in mainstream smoke.²⁶ The Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. 651-678, regulates hazards in the workplace. 29 C.F.R. 1910.1000 provides examples of acceptable limits of potentially hazardous substances. The OSHA safe limit for carbon monoxide is 50 parts per million.²⁷ Even Surgeon General Koop asserts that "if this evidence were available on any other single environmental pollutant, other than ETS, we would have acted long ago."²⁸

Tobacco smoke exposure is associated with an increased risk of influenza, colds, and infections. Scientists account for this phenomenon by explaining that tobacco pollution "significantly lowers the level of antibody production of influenza virus A2,"²⁹ suppresses the lymphocyte's function in the immune process,³⁰ and "affects the body's ability to utilize Vitamin C."³¹

Scientists have also discovered that tobacco smoke tends to aggravate allergies.³² Over 34 million Americans are in some way sensitive to cigarette smoke.³³ Acute asthmatic attacks requiring immediate medical treatment can be precipitated by passive smoking.³⁴ Less severe, but annoying, passive smoke effects include: eye, nose and throat irritation, headaches, and coughing.³⁵

Recent studies have focused on the effects of passive smoking on nonsmoking spouses and children. The University of Utah studied 14,000 men and women and concluded that "female nonsmokers married to smokers are three times more likely to have heart attacks than those married to nonsmokers."³⁶ Similarly, a 10-year longitudinal study at the University of California at Berkeley concluded that smokers' wives were 2.5 times more likely to die from heart disease than nonsmokers' wives.³⁷ More alarming was the finding that the death rate was even higher when known heart disease risk factors were ruled out as causes. Likewise, ETS smoke is hazardous to children. The National Academy of Sciences reported last month that smoke in the home doubles the chances of children contracting respiratory disease.³⁸ This supports the Surgeon General's conclusion that "the children of parents who smoke, compared to children of nonsmoking parents, have increased frequency of respiratory infections, increased respiratory symptoms, and slightly smaller rates of increase in lung function as the lung matures."³⁹ Additional studies establish that passive smoking by children results in permanent long term adverse effects.⁴⁰ Smokers' children demonstrate "measurable deficiencies in physical growth, intellectual and emotional development, and behavior."⁴¹

Finally, the newborns of smoking mothers weigh about

200 grams less than newborns of nonsmoking mothers.⁴² Infants of smoking mothers require hospitalization for bronchitis and pneumonia significantly more times than infants of nonsmoking mothers.⁴³ Moreover, smoking mothers are at greater risk for stillborn births as are their infants for neonatal death than are nonsmoking mothers and their infants.⁴⁴

Tobacco Pollution as a Restitutive Wrong

It has been argued that "People have a right to be protected from air pollution to the same extent that the law protects them from injuries to their person and property of other sorts."⁴⁵ The law of torts and common law provides legal redress for harm caused by tobacco pollution. The restitutive interest in common law tort rectifies the injustice of a tortfeasor's wrongful conduct which injures others while enriching the tortfeasor.⁴⁶

The Tobacco Products Liability Project (TPLP), organized in 1985, provides legal redress for tobacco-caused disease and death and to shift the economic burden now forced upon society onto the tobacco industry.⁴⁷ Wrongful death and personal injury product liability lawsuits against tobacco manufacturers represent one strategy to combat the public health hazards of tobacco smoke.⁴⁸

Should the tobacco industry be held strictly liable for tobacco pollution-caused injuries experienced by nonsmokers? This question poses interesting variations to the typical products liability problem. For example, the prime user or consumer of tobacco products is the smoker, not the nonsmoker. Additionally, the tobacco industry acknowledges that its products are hazardous to smokers, but denies any such risk to nonsmokers.

A more predictable product liability problem is presented when it is the smoker who sues the manufacturer. The smoker may claim that cigarettes are unsafe and defective and that the manufacturer failed to adequately warn the consumer of the hazards of addiction to smoking and advertised cigarettes misleadingly. However, the tobacco industry argues in defense that the smoker assumed the risk of smoking. In December, 1986, Melvin Belli, "The King of Torts," lost a tobacco product liability case when he could not convince a jury that R.J. Reynolds Tobacco Co. was responsible for smoker John Galbraith's addiction to smoking and his death from tobacco-related diseases.⁴⁹

Unless and until courts accept the addiction argument, it seems unlikely that smokers will prevail over tobacco companies. However, there remain many millions of nonsmokers victimized by tobacco pollution. Until recently, it was ludicrous to suggest that nonsmokers seriously consider litigation against the tobacco industry. However, the medical and scientific research regarding the hazards of passive smoking necessitates consideration of this strategy.

The Tobacco Industry Should be Held Strictly Liable for Tobacco Pollution-Caused Injuries Experienced by Nonsmokers

In structuring legal arguments for the nonsmoker two theories of recovery emerge:

Section 402A of the *Restatement (Second) of Torts* — strict products liability and strict liability for tobacco pollution as abnormally dangerous.⁵⁰

Section 402A identifies seller liability for physical harm caused by its sale of a defective product that is unreasonably dangerous to the ultimate user or consumer.

402A. SPECIAL LIABILITY OF SELLER OF PRODUCT FOR PHYSICAL HARM TO USER OR CONSUMER

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Caveat:

The Institute expresses no opinion as to whether the rules stated in this Section may not apply

- (1) to harm to persons other than users or consumers;
- (2) to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer; or
- (3) to the seller of a component part of a product to be assembled.

Analysis of Section 402A suggests the following interpretation with respect to the tobacco industry and its liability to nonsmokers. A "defective" product, for liability purposes, causes injury when used for any reasonably foreseeable purpose.⁵¹ The tobacco industry sells tobacco products for the intended purpose of smoking. Indeed, industry profiles are dependent upon sales. When smoked, tobacco products pollute the atmosphere and endanger human health. Consequently, tobacco products qualify as defective products. Moreover, tobacco products are unreasonably dangerous for nonsmokers in light of the causal connection between passive smoking and cancer. Tobacco products reach nonsmokers or ultimate users

packaged by the manufacturer without alterations.

A possible difficulty with the applicability of Section 402A for the nonsmoker is the interpretation of "ultimate user or consumer." The tobacco industry may cite caveat (1) and argue that a nonsmoker is someone other than the ultimate user or consumer of tobacco products and further identify the nonsmoker as a bystander whose interests are not protected by Section 402A. Such a narrow interpretation fails to recognize the magnitude of the effect of smoking hazards on public health. Instead, the need to impose liability should guide the interpretation of "an ultimate user or consumer." Cases of liability are said to exist for injuries resulting from nonreciprocal risks.⁵² The tobacco industry creates excessive risks of harm to nonsmokers, who are totally innocent of risk-creating activity. Moreover, the nonsmoker is the ultimate victim in the chain of risk.

The second argument for the nonsmoker proposes traditional strict liability for abnormally dangerous tobacco pollution that causes human injury and disease.

519. GENERAL PRINCIPLE

- (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
- (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

520. ABNORMALLY DANGEROUS ACTIVITIES

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

A combination of factors dictates that tobacco pollution is an abnormally dangerous activity. Medical and scientific research conclusively demonstrates that tobacco smoking causes significant health hazards to passive smokers. The likelihood that harm will result from nonsmokers inhaling sidestream smoke is great. It is often impossible for nonsmokers to eliminate the risks of passive smoking when a voluntary risk by a smoker becomes an imposed risk for a nonsmoker. Although smoking was traditionally an accepted social activity, its acceptance today has been eroded. According to a 1985 Gallup poll, 62% of tobacco users

and 85% of abstainers think smokers should not light up when nonsmokers are around.⁵³ Clean air must be a public health and safety priority to assure human survival. The many health hazards caused by tobacco pollution cannot be justified by a \$6 billion yearly tobacco tax contribution to federal, state, and local governments.⁵⁴

The tobacco industry is in the lucrative business of selling tobacco products known to cause grave physiological harm to nonsmokers. Passive smokers experience inevitable injury from abnormally dangerous tobacco smoke. Clearly, nonsmokers have not misused a product nor chosen to use it knowing its dangerous aspects. Rather, nonsmokers have been passively injured by a process initiated by the tobacco industry.

In *Atlas Chemical Industries, Inc. v. Anderson*,⁵⁵ the defendant chemical company was held strictly liable for intentionally discharging effluents into a stream. The court reasoned that strict liability applies to pollution cases when:

[T]he defendant has set the substance in motion for escape, such as the discharge of the harmful effluent or the emission of a harmful gas or substance. . . . The question thus becomes one of whether the conduct of the actor was intentional or unintentional and is not a question of whether the resulting damages were intended or unintended. . . . By intentionally discharging its effluent into the stream, it became liable for all of the foreseeable damages resulting from the harm caused by the effluent.⁵⁶

The financial success of the tobacco industry depends on the sale of tobacco products. The industry reasonably believes that its products will be smoked. The tobacco industry has intentionally set in motion the sales of its products knowing that tobacco pollution will result. By intentionally promoting the discharge of tobacco smoke into the atmosphere, the tobacco industry is liable for all foreseeable damage resulting from the harm caused by the tobacco smoke. Physiological injury and disease sustained by nonsmokers represents such harm.

Proponents of the tobacco industry would challenge this analysis by asserting that the analogous party to Atlas Chemical Industries is the smoker, not the tobacco industry. After all, it is the smoker who lights up. Therefore, the argument continues, nonsmokers should seek legal recourse against smokers. However, such an argument ignores the relevance of cost-benefit analysis, which considers, "as between the possible tortfeasor and the victims, who could have avoided the injury that occurred, or might have occurred, at the least cost?"⁵⁷ The tobacco industry controls the course of tobacco pollution. Regardless of the tax benefits derived from tobacco products, the numbers of victims include all nonsmoking adults, children, infants, and gestational fetuses who are around smoke. Lung

cancer annually claims 2,400 lives of healthy nonsmokers who passively inhale tobacco smoke.⁵⁸ Moreover, it is estimated that smoking costs exceed \$100 billion a year.⁵⁹ It becomes clear that determining cost in this situation involves more than lost tax benefits. When the cost of ensuring the health and welfare of millions of Americans is considered, the lost profit of the tobacco industry emerges as a lesser cost.

Furthermore, tobacco industry liability is reinforced by cost-spreading principles. The tobacco industry, rather than the smoker, is far better able to compensate passive smoking victims for their injuries. Multiplicity of sources and victims was recognized and overcome in *Sindell v. Abbott Laboratories*.⁶⁰ The court in *Sindell* imposed liability on all manufacturers of DES. Similarly, the tobacco companies are in the best position to spread and bear the costs of tobacco pollution injury and disease.

Conclusion

The evolution of strict liability has expanded legal horizons to deal with complex tort situations having broad social significance. The peril of tobacco pollution for nonsmokers represents only one example. Indeed, the trend in case law is to recognize manufacturer liability to the innocent bystander.⁶¹ The time has come for courts to provide restitution for nonsmokers by recognizing the tobacco industry's liability to these innocent bystanders.

FOOTNOTES

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21. 1975 Report, *supra* note 17, at 97.
22. 1972 Report, *supra* note 16, at 142. "Tobacco tar" is the name given to the aggregate of particulate matter in cigarette smoke after subtracting nicotine and moisture.
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